Lee Bak Soon @ Lee Pak Choon v RHB Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-03–30 OF 2001
MOKHTAR SIDIN, LOW HOP BING AND RAUS SHARIF JJCA
20 NOVEMBER 2007

Bankruptcy — Act of bankruptcy — Application to set aside bankruptcy notice — Whether judgment debtor's failure to appeal against High Court judgment militates against judgment creditor enforcing judgment — Whether judgment debtor can set aside the bankruptcy notice despite not appealing to the High Court judgment

Bankruptcy — Act of bankruptcy — Failure to pay sum demanded in the bankruptcy notice — Whether there was a breach by bidder who, having paid 10% deposit failed to pay balance within prescribed 90 days — Whether 10% deposit paid by the bidder should have been forfeited and credited to judgment debtor's account

Bankruptcy — Notice — Interest arrears due on judgment debt included in bankruptcy notice — Whether judgment creditor wrong in law for allegedly claiming legal fees, costs and expenses relating to another suit — Whether demand contained in judgment creditor's bankruptcy notice should be set off or reduced taking into account interest charged by judgment creditor against judgment debtor for judgment creditor's own wrongful conduct in undervaluing charged property

On 31 October 1994, RHB Bank Bhd, the judgment creditor ('JC') filed a bankruptcy notice against the appellant, judgment debtor ('JD') to recover the sum of RM129,843.47 premised on a judgment obtained under O 14A of the Rules of the High Court 1980 on 2 February 1989 at the Kuantan High Court (Civil Suit No 232–93 of 1998 ('the civil suit')]. There was no appeal against that judgment. On 20 May 1995, the JD filed an affidavit in encl 7 under r 95 of the Bankruptcy Rules 1969 to set aside the bankruptcy notice ('the JD's application'). The JD's application was premised in relation to an auction of charged property pursuant to an order for sale granted by the Kuantan High Court in OS No 31–235 of 1986 ('the auction suit'). The appellant had also appealed to the auction suit to the then Supreme Court.

Held, appeal dismissed with costs:

(1) The O 14A judgment which led to the JC's request for the issue of the bankruptcy notice against the JD was a final judgment. As the JD had not appealed nor obtained a stay of execution, the JC was entitled to enforce the final judgment (see para 14).

(2) There was no dispute that the JD's bankruptcy notice as in the prescribed form had stated the consequences of non-compliance therewith and had been served in the prescribed manner under s 3(2) of the Bankruptcy Act (see para 15).

(3) The grounds stated in the JD's application was premised on the auction suit which had proceeded to the then Supreme Court ('Supreme Court appeal'). Further, the JD had not lodged any appeal against the final judgment obtained by the JC under O 14A in the civil suit which led to the issuance of the bankruptcy notice against the JD. The grounds raised in the JD's application should have been ventilated in the civil suit, the auction suit or the Supreme Court appeal. The JD's failure, refusal or neglect to do so would in the court's view militate against the JD's appeal before the High Court and now in the instant appeal in so far as the bankruptcy notice is concerned. It also represented a total lack of bona fide on the part of the JD (see para 21).

(4) It was obvious that the JD had failed to comply with the requirements of the JC's bankruptcy notice. Consequently, he had committed an act of bankruptcy and as such the High Court arrived at a correct decision in dismissing the JD's application (see para 26).

[Bahasa Malaysia summary

Pada 31 Oktober 1994, RHB Bank Berhad, pemiutang penghakiman telah memfailkan notis kebankrapan terhadap perayu penghutang penghakiman untuk mendapatkan semula jumlah RM129,843.47, yang terdapat dalam penghakiman yang diperolehi di bawah A 14A Kaedah-kaedah Mahkamah Tinggi 1980 pada 2 Februari 1989 di Mahkamah Tinggi Kuantan (Guaman Sivil No 232–93 tahun 1998 ('guaman sivil')). Tiada rayuan terhadap penghakiman. Pada 20 Mei 1995, penghutang penghakiman memfailkan afidavit dalam lamp 7 di bawah Kaedah 95 Kaedah-kaedah Kebankrapan 1969 untuk mengenepikan notis kebankrapan ('permohonan penghutang penghakiman'). Permohonan penghutang penghakiman telah difailkan berkaitan dengan satu lelongan untuk hartanah yang telah dicagarkan menurut perintah penjualan yang telah diperolehi daripada Mahkamah Tinggi Kuantan dalam saman pemula No 31–235 tahun 1986 ('guaman lelongan'). Perayu juga telah merayu guaman lelongan kepada Mahkamah Agong pada masa itu.

Diputuskan, rayuan ditolak dengan kos:

(1) Penghakiman A 14A yang membawa kepada permintaan pemiutang penghakiman untuk mengeluarkan notis kebankrapan terhadap penghutang penghakiman adalah penghakiman akhir. Memandangkan pemiutang penghakiman tidak merayu dan tidak mendapatkan penggantungan perlaksanaan, penghutang penghakiman adalah berhak untuk menguatkuasakan penghakiman akhir (lihat perenggan 14).

(2) Tidak ada sebarang pertikaian bahawa notis kebankrapan penghutang penghakiman adalah dalam borang yang disediakan dan telah menyatakan kesan-kesan ketidakpatuhan terhadapnya dan telah menyampaikan dalam keadaan yang disediakan di bawah s 32 Akta Kebankrapan (lihat perenggan 15).

(3) Alasan-alasan yang dinyatakan dalam permohonan penghutang penghakiman adalah ditetapkan untuk guaman sivil yang telah berterusan sehingga kepada Mahkamah Agong ('Mahkamah Rayuan Agong'). Selanjutnya, penghutang penghakiman tidak membuat sebarang rayuan terhadap penghakiman akhir yang telah diperolehi oleh pemiutang pnghakiman di bawah O 14A dalam guaman sivil yang telah membawa kepada pengeluaran notis kebankrapan terhadap penghutang penghakiman. Alasan-alasan yang dibangkitkan dalam permohonan penghutang penghakiman hendaklah dimasukkan dalam guaman sivil, guaman lelongan atau rayuan Mahkamah Agong. Kegagalan, keengganan dan kecuaian penghutang penghakiman berbuat demikian pada pandangan mahkamah memberikan pengaruh yang amat besar terhadap rayuan penghutang penghakiman di hadapan Mahkamah Tinggi dan sekarang dalam rayuan terkini kepada notis kebankrapan. Ia juga menunjukkan kekurangan sepenuhnya bona fide di pihak penghutang penghakiman (lihat perenggan 21).

(4) Ia adalah jelas bahawa penghutang penghakiman telah gagal untuk memenuhi keperluan-keperluan notis kebankrapan pemiutang penghakiman. Oleh kerana itu, beliau telah melakukan perbuatan kebankrapan dan oleh itu Mahkamah Tinggi telah mencapai keputusan yang betul dalam menolak permohonan penghutang penghakiman (lihat perenggan 26).]

Notes

For a case on application to set aside bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2278.

For a case on failure to pay sum demanded in the bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2289.

For a case on interest arrears due on judgment debt included in bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2550.

Cases referred to

Arunachalam; ex p Indian Overseas Bank Ltd, Re [1968] 1 MLJ 89 (refd)
Easton, Re [1893] 9 TLR 409 (refd)
Khoo Chee Tong: Ex Parte Unik (M) Sdn Bhd, Re [1996] 5 MLJ 39 (refd)
Sovereign General Insurance Sdn Bhd v Koh Tiam Bee [1988] 1 MLJ 304 (refd)
United Marine Supply Co, Re [1960] 26 MLJ 305 (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i) & s 3(2)(ii)
Bankruptcy Rules 1969 r 95

Appeal from: Bankruptcy No 29–534 of 1994 (High Court, Kuantan)

Bastion Pius Vendargon (Vendargon & Partners) for the appellant.
Hon Kai Peng (HY Lee & Hee) for the respondent.

Low Hop Bing JCA:

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge in allowing the judgment creditor's appeal and setting aside the decision of the registrar. The learned judge had in essence dismissed the application filed by the judgment debtor ('the JD') under r 95 of the Bankruptcy Rules 196 ('r 95').

[2] The JD had appealed against the learned judge's decision.

[3] This appeal was heard and dismissed on 20 June 2007. We now give our grounds.

[4] Parties have agreed that the outcome of this appeal shall also bind the parties in two other appeals viz Civil Appeals No C-03–26 of 2001; and No C-03–27 of 2001, pending in this court.

FACTUAL BACKGROUND

[5] On 31 October 1994, RHB Bank Bhd, the judgment creditor ('JC') filed a bankruptcy notice against the JD to recover the sum of RM129,843.47, based on a judgment obtained under O 14A of the Rules of the High Court 1980 on 2 February 1989 in Kuantan High Court Civil Suit No 232–93 of 1998 ('the civil suit'). There was no appeal against that judgment.

[6] On 20 May 1995, the JD filed an affidavit in encl 7 under r 95. That was the JD's application to set aside the bankruptcy notice ('the JD's application'). A

[7] The JD's application was in relation to an auction of charged property pursuant to an order for sale granted by the Kuantan High Court in OS No 31–235 of 1986 ('the auction suit'). The grounds of the JD's application are: B

(1) The JC's claim for RM511.97 against the JD allegedly for legal fees, costs and expenses relating to Supreme Court Case No 03–15 of 1989 ('the Supreme Court case') was wrong in law (para 3.1. of the affidavit); C

(2) The demand contained in the JC's bankruptcy notice should set off or reduce the sum of RM33,797.25 which was the interest charged by the JC against the JD for the JC's own wrongful conduct in undervaluing the charged property (para 3.2 ibid);

(3) There was a breach by the bidder who bidded for RM160,000 for the charged property, paid 10% deposit but failed to pay the balance within the prescribed 90 days (para 3.3, ibid); and D

(4) The 10% deposit paid by the bidder should have been forfeited and credited to the JD's account (para 3.4, ibid). E

[8] On 14 August 1995, the JC filed an affidavit in reply thereto.

[9] The JD's application was heard on 12 March 1996 by the High Court registrar who set aside the JC's bankruptcy notice with costs. F

[10] On 12 March 1996, vide encl 11A, the JC filed an appeal to judge in chambers.

[11] On 26 July 2001, the learned judge allowed the JC's appeal with costs and reinstated the JC's bankruptcy notice. Hence, this appeal. G

ACT OF BANKRUPTCY

[12] Learned counsel Dato' Bastian Pius Vendargon relied on the grounds set out in the JD's affidavit, and submitted that the JD had committed no act of bankruptcy, citing: H

(1) Section 3(1)(i) and s 3(2)(ii) of the Bankruptcy Act 1967; I

(2) *Re Arunachalam; ex p Indian Overseas Bank Ltd* [1968] 1 MLJ 89;

(3) *Re United Marine Supply Co* [1960] 26 MLJ 305; and

(4) *Sovereign General Insurance Sdn Bhd v Koh Tiam Bee* [1988] 1 MLJ 304.

[13] JC's learned counsel Mr Hon Kai Peng contended that:

(1) the grounds raised in the JD's application should have been raised in the civil suit, the auction suit; and/or in the Supreme Court case and the court exercising jurisdiction in bankruptcy proceedings cannot go behind the judgment obtained, relying also on *Sovereign General Insurance Sdn Bhd*; and

(2) the JD's objection is not bona fide, on the strength of *Re Khoo Chee Tong; ex parte Unik (M) Sdn Bhd* [1996] 5 MLJ 39

[14] We found that in the civil suit, the O 14A judgment which led to the JC's request for the issue of the bankruptcy notice against the JD is a final judgment as the JD has preferred no appeal nor obtained a stay of execution. The JC is entitled to enforce the final judgment. The JC is deemed to be a creditor under the proviso to s 3(1)(i) of the Bankruptcy Act 1967 which, where relevant, provides inter alia to the effect that any person who is for the time being entitled to enforce a final judgment shall be deemed to be a creditor.

[15] There is no dispute that the JD's bankruptcy notice is in the prescribed form and has stated the consequences of non-compliance therewith and has been served in the prescribed manner under s 3(2)of the same Act.

[16] The result of our consideration of the authorities cited for the JD is reflected in the analysis below.

[17] In *Re Arunachalam*, the bankruptcy notice demanded satisfaction of a judgment for RM4,344.64 as on 24 July 1967. It was undisputed that RM300 had been paid by the JD there, so that only RM4,044.64 was owing on the judgment. Chang Min Tat J (later FJ) invoked proviso (ii) to s 3(2) of the Bankruptcy Act 1967 and held that the bankruptcy notice was invalid as it referred to a sum in respect of which the JC could not have issued execution, in which case, the bankruptcy notice was set aside.

[18] In *Re United Marine Supply Co*, the bankruptcy notice was for a claim which was more than the debt due. The claim for balance due on a final judgment had erroneously included a sum of $50 which had been accepted by the creditor as payment towards the judgment debt. Rose CJ (Singapore) upheld the JD's contention that the defect, being not a mere formal defect or irregularity, could not be rectified by the Court.

[19] Except for the different amounts, both *Re Arunachalam* and *Re United Marine Supply Co* share substantially similar facts.

[20] However, in sharp contrast to *Re Arunachalam* and *Re United Marine Supply Co,*the bankruptcy notice in the instant appeal carries a distinguishing feature in that the JD has made no payment in satisfaction or part satisfaction of a final judgment. That being the case, we are of the view that the JD's reliance thereon is unsustainable.

[21] It deserves to be noted that the grounds enumerated in the JD's application were based on the auction suit which has proceeded to the then Supreme Court by way of the Supreme Court case. Further, the JD has not lodged any appeal against the final judgment obtained by the JC under O 14A in the civil suit which led to the issuance of the bankruptcy notice against the JD. The grounds raised in the JD's application should have been ventilated in the civil suit, the auction suit or the Supreme Court case. The JD's failure, refusal or neglect to do so would in our view militate against the JD's appeal before the High Court and now in the instant appeal in so far as the bankruptcy notice is concerned.

[22] In *Sovereign General Insurance Sdn Bhd,* pursuant to a judgment, a bankruptcy notice was issued against the JD who failed to comply therewith. The JC took out a creditor's petition which was struck out by the High Court judge who in the exercise of his jurisdiction in bankruptcy proceedings went behind the judgment and disputed the validity of the orders made in earlier execution proceedings when the orders have not been set aside. On appeal, the then Supreme Court in a judgment delivered by Lee Hun Hoe CJ (Borneo) (as he then was) disapproved of the approach adopted by the High Court judge. At p 305, the Supreme Court referred to *In Re Easton* (1893) 10 Mor 111; 9 TLR 409 and held that the High Court in exercising jurisdiction in bankruptcy proceedings, eg in an application to set aside a bankruptcy notice could not go behind the judgment.

[23] The above principle enunciated in *Sovereign General Insurance* was followed by Haidar J (later CJ (Malaya)) in *Re Khoo Chee Tong*, where the court dismissed the JD's attempt to set aside the bankruptcy notice on the ground, inter alia, that the judgment on which the bankruptcy notice was based was tainted with illegality.

[24] Quite apart from that, the JD's failure, refusal or neglect to raise the aforesaid grounds in the proper forum viz either in the civil suit, the auction suit or the Supreme Court case clearly demonstrates a total lack of bona fide on the part of the JD.

[25] A similar situation arose in *Khoo Chee Tong*, where the JD had never challenged the judgment entered against him but did so only when he filed

a notice of motion (which was held to be procedurally wrong) alleging, inter alia, that the judgment was tainted with illegality. It was held to be lacking in bona fide.

[26] Reverting to the mainstream of the factual background herein, it is obvious that the JD has failed to comply with the requirements of the JC's bankruptcy notice. Consequently, he has committed an act of bankruptcy. We hold that the High Court has arrived at a correct decision in dismissing the JD's application.

CONCLUSION

[27] On the foregoing grounds, we find no merits in the JD's appeal. By unanimous decision, the JD's appeal is hereby dismissed with costs. The orders of the High Court are affirmed. Deposit to the JC towards account of taxed costs.

[28] Mokhtar Sidin JCA (as he then was) has retired in September 2007. Raus Sharif JCA who has read this judgment in draft has expressed his agreement for it to be the judgment of this court.

Appeal dismissed with costs.

Reported by Dipendra Harshad Rai